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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-21

SALVATORE BARONE, SENIOR AND
SALVATORE BARONE, JUNIOR,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR
A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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TOPICAL INDEX

	Page
Table of Authorities	ii
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT	2
ARGUMENT	4
CONCLUSION	11

TABLE OF AUTHORITIES

Cases	Page
Az Din v. U.S., 232 F.2d 283 (1956 - 9th Circuit)	7
U.S. v. Clavin, (1921) 1921 F. 986	5
U.S. v. Flowers, (1966) 255 F.S. 485	5
U.S. v. Fullmer, 457 F.2d 447 (1972)	9
U.S. v. Love, 534 F.2d 87 (1976)	8
Vierick v. U.S., 318 U.S. 236, 63 S.Ct. 561, 87 L.Ed. 734 (1943)	10
U.S. v. Hayward, 136 U.S. App. D.C. 300, 420 F.2d (1969)	10
U.S. v. Russell, (1973) 411 U.S. 423	4
U.S. v. Nataro, (1966 - 9th Circuit) 363 F.2d 172	4
U.S. v. Sherman, (1958) 356 U.S. 369	4
U.S. v. Sorrels, (1932) 287 U.S. 435	4
U.S. v. Vixie, (9th Circuit - 1976) 532 F.2d 1277	5

Statutes	
18 U.S.C. §371	2, 3
18 U.S.C. §641	2, 3
18 U.S.C. §942 (c) (2)	2
18 U.S.C. §5010 (e)	3
28 U.S.C. §1254 (1)	2

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OPINION BELOW

The opinion of the Court of Appeals is attached hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 1977 (see Appendix A). The jurisdiction of this court is invoked under

28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

---

1. Was Defendant BARONE SENIOR entrapped as a matter of law?

2. Should a mistrial have been declared when the government attempted to link the Defendants with the "SLA Shootout"?

3. Was the evidence sufficient to convict Appellant BARONE JUNIOR under 18 U.S.C. §641?

4. Was the verdict acquitting Appellant BARONE JUNIOR on the conspiracy count, but convicting him on the Substantive count, impermissibly inconsistent?

STATEMENT

A three count indictment was returned by the Grand Jury charging SALVATORE BARONE SENIOR with violations of 18 U.S.C. §371 (conspiracy), 18 U.S.C. §641 (receiving stolen property), and 18 U.S.C. §942 (c) (2), (unlawfully carrying a firearm during the commission of a felony).

A two count indictment was returned against SALVATORE BARONE JUNIOR charging violation

of 18 U.S.C. §371 (conspiracy) and 18 U.S.C. §641 (receiving stolen weapons).

BARONE SENIOR AND BARONE JUNIOR plead not guilty and were tried before a jury in the United States District Court, Central District of California, the Honorable Robert Firth presiding.

A co-defendant, LUPE CONTRERAS, plead guilty before trial.

Defendant BARONE SENIOR based his defense solely on the issue of entrapment and was found guilty of all three counts and was sentenced to three years in prison.

Defendant BARONE JUNIOR based his defense on his plea of not guilty, his lack of prior knowledge, and his lack of intent to commit the crime. He was acquitted on the conspiracy count, but found guilty on the substantive count. He was sentenced to a 60 day youth offender diagnostic study pursuant to 18 U.S.C. §5010 (e).

Timely notices of appeal were filed in the Ninth Circuit Court of Appeals and a motion to consolidate the two appeals were granted.

The United States Court of Appeals for the Ninth Circuit heard oral argument on the issues presented and on June 3, 1977 entered a Memorandum Opinion affirming the conviction.

Petitioner BARONE SENIOR, at trial, presented corroborated evidence that he had

been enticed into procuring weapons by a government informer and that he had no predisposition to commit the crime.

The jury agreed that BARONE JUNIOR did not participate in a conspiracy yet found that he had committed the substantive crime even though the conviction on the substantive count depended on a belief by the jury of the truth of the key element of the conspiracy charge.

ARGUMENT

1. Petitioners contend that both the trial court and appeals court erred in their determination of the law as it applied to them.

BARONE SENIOR showed ample evidence that he was entrapped as a matter of law yet the trial Judge, and the Appeals Court, ruled that this was no entrapment. U.S. v. Sorrels (1932) 287 U.S. 435; U.S. v. Sherman (1958) 356 U.S. 369 and U.S. v. Russel (1973) 411 U.S. 423.

Petitioner BARONE SENIOR also contends that the Prosecution failed to meet its burden under U.S. v. Nataro, 363 F.2d 172 (1966 - Ninth Circuit) in that "The issue [of entrapment] having appeared it becomes the Prosecution's burden to establish beyond a reasonable doubt that the accused was not entrapped into the commission of the offense."

Regarding BARONE JUNIOR, there was ample evidence produced which indicated that BARONE JUNIOR had no knowledge of a conspiracy and that he possessed no criminal intent.

The probity of that evidence was borne out by the fact that the jury acquitted BARONE JUNIOR on the conspiracy count. Such a result could have been reached only if the jury believed that BARONE JUNIOR had no knowledge or intent regarding the crime. Surprisingly, however, the jury somehow chose to believe he had the intent for the substantive crime.

While courts do not normally invade the providence of the jury concerning inconsistent verdicts, U.S. v. Vixie, 532 F.2d 1277 (9th Cir. Court, 1976), in the instant case there is an unusual situation where there is no escaping the fact that the jury both believed, and disbelieved, the very same facts. U.S. v. Flowers, 255 F.S. 485 (1966) and U.S. v. Clavin, 272 F. 986 (1921).

Perhaps the most striking reason for granting the Petition in the instant case is the prosecutorial misconduct perpetrated by the Government.

Twice during its closing argument, the government prosecutor mentioned the infamous Los Angeles, Patty Hearst, "SLA Shoot-out." The trial brought out absolutely no evidence regarding this event and absolutely no connection between the SLA and the defendants was ever established. The Reporter's Transcript (page 1054)

reads as follows:

> "Mr. WU: Your Honor, may it please the court. Good morning, ladies and gentlemen of the jury, counsel, defendants.
>
> "Less than two years ago a tragic incident occurred in the Los Angeles area which was witnessed by not only inhabitants of Los Angeles but nation-wide, and indeed, the world at large, an incident which involved violence, destruction of property, the snuffing out of lives, which very violence involved the use of fire power and firearms. Less than two months following the SLA shootout in Los Angeles another incident occurred --
>
> "MR. NASATIR: Excuse me, your Honor. I am going to object to any characterization of this as a violent act. I think it is calculated to inflame the jury, and on that basis I object.
>
> "MR. LEWIS: I join in the objection, your Honor.
>
> "MR. WU: Less than two months after that incident --
>
> "MR. NASATIR: Well, same objection, your Honor. I ask that the prosecutor be admonished.

"THE COURT: Disregard the reference to the SLA shooting."

The only purpose of this statement was to impassion and inflame the jury. Such an obvious dispaly of prejudice should have resulted in the Judge himself immediately declaring a mistrial; the admonition alone was insufficient to offset the prejudice.

As the Court said in Az Din v. U.S., 232 F. 2d 283 (1956 Ninth Circuit):

> "It is error for a prosecutor to appeal to passion and prejudice concerning matters irrelevant to the case. However, where the trial judge had admonished the jury to disregard it, such improper conduct justifies reversal only when the 'remarks are not the kind the jury put out of their minds simply by being told to do so.'" (Citations omitted.)

The reference to the SLA in the instant case is exactly the type of prejudicial comment that a jury cannot be admonished into ignoring. The SLA shootout was a televised horror that saw a peaceful neighborhood disrupted by police, engulfed by flames, peppered by gunfire, and which saw the violent deaths of a number of young radicals. When viewed in the light of the fact that this was a Los Angeles jury, only a year after the shootout itself, and that Patty Hearst was still in the headlines, it becomes clear that the linking of the defendants with the SLA was a highly prejudicial situation which could only inflame the

passions of the jury against the defendants.

When the SLA statement is further coupled to the highly prejudicial display of weapons that occurred in the courtrooms, the tone of the government's case is apparent. Defense Counsel entered into a stipulation with the government limiting the number og gunds that would be brought into the courtroom and displayed to the jury. Only those crates that were opened, that contained guns that BARONE JUNIOR could have seen, were to have been brought into the courtroom (R. T. 344 to 355).

The government actually brought over forty weapons and crates and duffel bags into the courtroom, which had a devistating effect on the jury. Counsel's motion for an immediate mistrial was denied. Aside from the fact that there is a serious question of whether the government even attempted to keep to the agreed stipulation, the display of such a large number of guns is highly flammatory and prejudicial toward the defendants. Juxtaposing the display of weapons with the SLA shootout created a mood in the mind of the jury of fear and prejudice that deprived the defendants of a fair trial.

In U.S. v. Love, 534 F.2d 87 (1976) the appeals court reversed the defendant's conviction of transmitting in interstate commerce a threat to injure another person, because the prosecution injected the element of possible Mafia connections. The trial judge admonished the prosecutor and warned the jury to disregard the statement, since no evidence remotely suggested the defendant

was Mafia connected.

The appeals court felt, however, that even an admonition to the jury was insufficient to insure a fair trial and reversed the lower court, even without a motion for mistrial having been made at the trial level. The court based its decision on the Due Process clause.

A case even closer on point with the instant case is U.S. v. Fullmer, 457 F.2d 447 (1972). In that case, the defendant was convicted of knowingly and willfully conducting the business of a firearms dealer on premises not licensed to him. The Appeals Court said:

> "We hold that the prosecuting attorney made two inflammatory, highly prejudicial statements to the jury which constituted reversible error.
>
> "The prosecutor told the jury 'We have filed the case here under the Gun Control Act of 1968, which was passed by Congress to provide support for Federa, State and local enforcement agencies and officials in their fight against crime and violance . . . .' An objection by defendant's counsel was overruled by the Court.
>
> "Also, the prosecutor stated 'I don't have to tell you ladies and gentlemen what is happening today in our country with people -- not the man who shoots his wife or that kind -- but people who are using ammunition and guns for

> snipping and creating disturbances and so forth.' Again, an objection by defendant's counsel was overruled by the trial court. . . .
>
> "Defendant relies on such decisions as Viereck v. United States, 318 U.S. 236, 63 S.Ct. 561, 87 L.Ed. 734 (1943) and United States v. Hayward, 136 U.S. App. D.C. 300, 420 F.2d (1969) to support his argument that inflammatory remarks made by the prosecutor and admitted by the trial court are prejudicial and reversible error. . . .
>
> "We agree with defendant's contention that he was prejudiced by the inflammatory remarks made by the prosecution in this case. The use of such inflammatory comments by the United States Attorney could only arouse passion and prejudice causing what we feel was reversible error on the part of the trial court in overruling defense counsel's objections."

While Fullmer was reversed due to the trial Court's failure to sustain an objection, the key finding is that there is reversible error due to prejudice where a prosecutor has tried to connect a gun related offense with a larger, more vicious but factually unrelated societal evil.

The government's linking of the defendants with the SLA shootout during closing arguments was highly prejudicial to the defendants and should

result in this court's granting of the Petition for Certiorari and, ultimately, the reversal of their convictions.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* vs. SALVATORE BARONE, SENIOR and SALVATORE BARONE, JUNIOR, *Appellants.*	No. 76-2654 MEMORANDUM

[June 3, 1977]

Appeal from the United States District Court
for the Central District of California

Before: ELY and SNEED, Circuit Judges, and
CALLISTER,* District Judge.

The appellants were charged in a three-count indictment together with two co-defendants. Count one alleged a conspiracy to receive, conceal and retain stolen government property, count two alleged the substantive crime of receiving the same property, and count three charged Barone, Senior (Senior) with the possession of a concealed weapon while committing a felony. The appellants entered pleas of not guilty and the case proceeded to trial as to both, father and son. The jury returned a verdict of guilty on all three counts against Senior, and a verdict of guilty as to Barone, Junior (Junior) on count two. Junior was acquitted on the conspiracy count.

Both appellants urge that reversal of their convictions is required because of a statement made by the prosecutor during closing argument, Senior contends that the evidence as to him

*Honorable Marion J. Callister, United States District Judge, District of Idaho, sitting by designation.

shows entrapment as a matter of law, and Junior contends both that the evidence was insufficient for his conviction, and that the jury verdict was impermissibly inconsistent as to him.

Facts

On July 4, 1974, the National Guard Armory in Compton, California, was burglarized, and a large quantity of weapons and ammunition were stolen. During the course of the FBI investigation, the Bureau offered a reward of $10,000 for information leading to the recovery of the weapons.

Senior owned a bar in the Whittier area which at some point he sold to one Frank Felice, and during the transaction the two men became friends. On July 30, 1975, the FBI was told by Felice that a possibility existed that a large amount of guns was available for sale. Bureau agents then asked Felice to obtain a list of the weapons if possible. Police obtained a list of the weapons from Senior, the list was delivered to FBI agents, and the agents requested that Felice obtain sample weapons.

On August 2, 1975, two FBI agents observed Senior transferring a bundle to Felice in an open field. The bundle was subsequently handed over to the agents by Felice and was found to contain an M-16 automatic rifle, an M-60 machine gun, and a grenade launcher. It was later verified that the weapons were among those stolen from the Compton armory.

The FBI then arranged a fake "buy" with one of their agents posing as a buyer from the East. The ruse worked successfully and both appellants were eventually arrested in the back yard of a co-defendant's home, surrounded by crates and boxes of stolen government weapons.

Prosecutorial Misconduct

At the beginning of his closing argument, the prosecutor made a reference to the "SLA shootout", a previous incident that had occurred in Los Angeles, deploring the violence, destruction of property, and snuffing out of lives. The trial judge immediately admonished the jury that there was no evidence in the case with respect to the SLA shootout, and instructed the jury to disregard the reference to the SLA. While we can conceive of

no possible reason or justification for injecting the SLA incident into this case, we conclude that the remark did not constitute reversible error in light of the trial judge's prompt corrective action and the record considered as a whole. *United States v. Gomez*, 523 F.2d 185 (9th Cir. 1975); *United States v. Bashaw*, 509 F.2d 1205 (9th Cir. 1975).

Entrapment

Senior's claim of entrapment is based primarily on his testimony as to the conduct of Felice. According to Senior, Felice pleaded with on several occasions to get something for Felice to "move" (*i.e.*, stolen property). After numerous requests, Senior agreed to talk to one of the co-defendants who allegedly had said that he had some guns for sale. Senior testified that he merely acted as a go-between in the transaction and that Felice insisted that Senior take part. Although Senior's testimony was corroborated to some extent by two employees of his bar, there was significant evidence indicating that Senior was a knowing and voluntary participant.

The flaw in Senior's argument is that it was rejected by the jury, under appropriate instructions, in the face of conflicting testimony. It is not our function to re-evaluate conflicting testimony, including the credibility of differing witnesses. In *United States v. Griffin*, 434 F.2d (9th Cir. 1970), we wrote:

> "Our earlier summation of the relevant facts demonstrates that there are definite conflicts in the testimony on the issue of how Griffin began selling heroin to Agent Henry. Under our decisions, the resolution of such conflicting assertions of fact relevant to the entrapment issue is a credibility question for the jury." *Id.* at 981.

Senior's reliance on *Sherman v. United States*, 356 U.S. 369 (1957) is misplaced. As the Court made clear in that case, it was not "choosing between conflicting witnesses, nor judging credibility." There, the relevant testimony was uncontradicted.

Sufficiency of the Evidence

There was sufficient evidence in the record to permit a rational conclusion by the jury that Junior was guilty beyond a reason-

able doubt. *United States v. Nelson,* 419 F.2d 1237 (9th Cir. 1969). Of no little importance is the fact that he was arrested in the back yard of a co-defendant's home while surrounded by the illegal weapons. One of the prosecution's agents also testified that Junior assisted in the counting and unloading of the weapons and that at one point Junior acted as a lookout. The same witness testified that when he expressed concern about the weapons being out in the open, a co-defendant assured him that it was all right, and Junior added "Don't worry about a thing" and "Everything is okay." When the agents protested that one of the essential parts of the weapons was missing, Junior allegedly responded, "Nobody has handled them but us."

Although Junior denied any knowing participation in the crime, the jury apparently did not accept his claim of innocence. The jury was not, of course, obliged to accept Junior's protestation of innocence. *United States v. Cisneros,* 448 F.2d 298 (9th Cir. 1971). *See also United States v. Cluchette,* 465 F.2d 749, 754 (9th Cir. 1972).

Inconsistent Verdict

Junior's contention that the verdicts as to him were inconsistent is without merit. *United States v. Vixie,* 532 F.2d 1277, 1278 (9th Cir. 1976).

AFFIRMED.

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